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No. 85-1819

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

G. THOMAS CESTARO,

Petitioner.

– against –

JAMES P. CORCORAN, as Superintendent of Insurance of the State of New York,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT

MEMORANDUM IN OPPOSITION

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MEMORANDUM IN OPPOSITION

Petitioner was duly licensed by the State of New York Insurance Department ("Department") as an insurance broker and agent, pursuant to New York Insurance Law former §§ 113 and 119[1], now Insurance Law, § 2110. (A20)[2]. He seeks review of a unanimous Order, dated December 12, 1985, of the Supreme Court of the State of New York, Appellate Division, First

[1] The Insurance Law was recodified in 1984 without substantive change.

[2] References to Petition's Appendix are denoted "(A. ____)".

Judicial Department (A31-A33). The order confirmed, without opinion, the determination of the respondent, Superintendent of Insurance, dated July 24, 1984, made after a hearing, revoking petitioner's license. (A17-A30). Respondent found that petitioner failed to report fraudulent practices to the Department's Insurance Frauds Bureau in violation of Insurance Law § 405, 407 and in breach of the fiduciary responsibility imposed on insurance brokers by Insurance Law § 2120, and that petitioner was guilty of "untrustworthiness and incompetency" as an insurance broker and agent, within the meaning of Insurance Law § 2110.

Petitioner's motion for leave to appeal to the New York State Court of Appeals was denied, without opinion, by Order of that Court, dated February 6, 1986 (A33). Petitioner's subsequent motion for a stay of enforcement of respondent's determination, pending a decision by this Court on the instant petition, was denied by Order of the Appellate Division, dated May 20, 1986.

Petitioner contends that his Fourteenth Amendment due process right to confront and cross-examine adverse witnesses was violated at the revocation hearing by the admission into the record of testimony elicited at a prior, related, summary suspension hearing, held pursuant to 11 NYCRR Part 31, with respect to the licenses of Omnibus Brokerage, Inc. ("Omnibus"), and Bruce S. Horowitz, individually and as representative broker of Omnibus.[3] Petitioner further contends that such prior testimony was actually relied upon by respondent in rendering the determination.

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[3] Although petitioner was charged in the Citation (A1-A16), also served on Horowitz and Omnibus, with knowledge of and participation in the fraudulent business practices of Omnibus, petitioner was not served with the Summary Suspension Order as to their licenses and was not a party to the summary suspension proceedings, because he was not licensed as a broker, agent or salesperson for Omnibus. In fact, although the hearing officer ultimately found otherwise (A24-A29), it has been petitioner's claim throughout that his only connection with Omnibus and Horowitz was as the source of a $100,000.00 personal loan to Horowitz, which enabled him to purchase the business, and as legal "troubleshooter" for Omnibus (A25).

Petitioner fails to raise any significant federal question meriting this Court's review. Rule 17(1). As recognized by the Appellate Division and the Court of Appeals, before which petitioner raised the identical due process issue, petitioner's right to confront and cross-examine adverse witnesses was not abridged in the administrative proceedings before the Insurance Department.[4]

Respondent does not dispute petitioner's right to a fair hearing, including the right to cross-examine adverse witnesses. Petitioner, however, waived whatever objections he may have had to the admission of the related hearing's transcript. First, as noted by the hearing officer, petitioner's counsel, who actively participated in the summary suspension proceedings, and were fully familiar with the evidence elicited, actually consented to the incorporation of the transcript of those initial proceedings into the record of the hearing on the Citation (R. 624-638) to avoid the duplicative effort and expense of recalling all the witnesses with respect to Horowitz and Omnibus.

Second, petitioner himself acknowledges (Pet. 5) that, to avoid even the possibility of prejudice to him by reason of the incorporation of the summary suspension hearing transcript into the record of petitioner's Citation hearing, the hearing officer ruled that if, upon examination of the transcript, petitioner and his substituted counsel felt it necessary to recall any witnesses, he would be permitted to do so *at the Department's expense* (R. 634-35, 637). Petitioner deliberately chose not to avail himself of the opportunity.

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[4] Petitioner deliberately misleads the Court when he states (Pet. 5) that he was excluded from the summary suspension hearing "upon the hearing officer's command." In fact, the hearing officer had "no idea that [Cestaro] was at the proceeding at all." (R. 624) Moreover, she specifically stated for the record: "It was not my ruling that he be excluded nor was I asked whether he could be in the hearing or not." (R. 634) ("R. ____" references refer to pages of the Record on Appeal in the Appellate Division, First Department).

Also, it is clear from the statement of petitioner's attorney at the Citation hearing that petitioner absented himself from the summary suspension hearing voluntarily, and on the advice of counsel. (R. 632)

It is well settled that a party to an administrative hearing may not claim the denial of his due process rights where he knowingly fails to avail himself of such rights. *Richardson v. Perales*, 402 U.S. 389, 402, 404-405 (1971). *See also Lichter v. U.S.*, 334 U.S. 742, 791-92 (1948). *Dorrance v. Department of Transportation*, 735 F.2d 516 (Fed. Cir., 1984) (failure to object to consolidation of hearings on employee terminations); *Buck v. Board of Education*, 553 F.2d 315, 319-320 (2d Cir. 1977) *cert den* 439 U.S. 903 (1977) (failure to request copy of hearing officer's report or attend hearing).

Moreover, petitioner was not harmed by the transcript's admission. He does not now specify, just as he neglected to demonstrate to the state appellate courts below, just what prejudicial testimony deriving from the summary suspension hearing was incorporated into the record of the Citation hearing, or just how respondent relied on such testimony to his detriment. In fact, the seven hundred page transcript of the summary suspension hearing contains only one substantive reference to petitioner,[5] and the hearing officer cited none of this testimony in her determination (A17-A30). Petitioner's failure to demonstrate any such prejudice renders his due process claim without substance. *See, Wasson v. Securities and Exchange Commission*, 558 F.2d 879 (8th Cir. 1977) [failure of hearing officer to inform petitioner of right to cross-examine not unconstitutional where petitioner identified no particular prejudice]; *Dorrance v. Department of Transportation*, *supra*, at 519 (no showing that consolidation of hearings prejudicial). *Buck v. Board of Education*, *supra*, at 319.

Rather, the clear and convincing evidence that petitioner was guilty of the charges in the Citation derives from the record of the Citation hearing which petitioner attended and not from the transcript of the summary suspension hearing. For example:

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[5] David Cohen, principal of Sport Brokerage, Inc., through which firm Omnibus wrote motorcycle insurance, testified that he would speak with either Horowitz or petitioner when he periodically stopped by the offices of Omnibus to pick up insurance applications (R. 288).

(a) Diane Allain, a former employee, testified at the petitioner's citation hearing that she informed petitioner of numerous complaints from motorcycle insurance clients who had not received their policies or permanent insurance identification cards, even after as much as seven or eight months' time; and of the troubling fact that, upon inquiring with the insurers, she would often be told that the relevant applications had never been received (R. 652-655, 660, 673). Nevertheless, Ms. Allain recalled, petitioner instructed her to issue new temporary identification cards, even though he knew that no policies were in effect (R. 653-655).

(b) Jeffrey Mintz, also a former employee, testified at the citation hearing that even after insurers refused to reinstate policies, Omnibus would forward premium checks (R. 710); and that, upon the return of these checks by the insurers to Omnibus, the uncashed checks were merely placed in the file (R. 710-712), no attempt having been made either to inform the clients that their policies were cancelled, or to refund the monies (R. 711). Mintz testified that he discussed this problem with petitioner, whose only response was that, pursuant to Insurance Law § 121, the policies would have to be reinstated because the premiums had been paid to the broker (R. 701, 726-727).

Unlike the cases on which petitioner relies (Pet. 13-17), this is clearly not one in which a hearing was foreclosed or cross-examination was prevented. *Cf. Coe v. Armor Fertilizer Works*, 237 U.S. 413 (1915). Nor did respondent violate an agency rule to petitioner's clear detriment. *Cf. Pacific Molasses Company v. Federal Trade Commission*, 356 F.2d 386 (5th Cir. 1966). This case is wholly distinct also from a criminal prosecution in which the facts raise substantial doubt as to whether an intelligent waiver occurred. *Cf. Brookhart v. Janis*, 384 U.S. 1, 4 (1966).

Here, petitioner was not prejudiced by his absence from the summary suspension hearing, or by the incorporation of the transcript of that prior hearing into the record of the hearing on the citation. Instead, represented by experienced counsel at both hearings, and himself an attorney, petitioner unequivocally and knowingly waived whatever objections he might otherwise have had. Moreover, the administrative proceeding here, viewed as

a whole, reflects flexible, practical application of essential due process protections, and this Court has consistently avoided imposing rigid, universally applicable rules. *Goss v. Lopez*, 419 U.S. 565, 577-79 (1975); *Bell v. Burson*, 402 U.S. 535, 540-41 (1971); *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 895 (1961). In view of the unrefuted facts regarding the conduct of the hearing and the settled law, petitioner has failed to raise a significant federal question to justify grant of the writ sought.

CONCLUSION

Therefore, the petition for a writ of certiorari should be denied.

Dated: New York, New York
July 3, 1986

Respectfully submitted,

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